

May 17, 2002

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

**Re: In the Matter of Applications for Consent to the Transfer of Control of
Licenses to AT&T Comcast Corporation
MB Docket No. 02-70**

Dear Ms. Dortch:

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") submits the following reply comments in response to comments filed by other interested parties in the above-captioned request to transfer control of licenses and authorizations held by Comcast Corporation ("Comcast") and AT&T Corporation ("AT&T") to AT&T Comcast Corporation ("AT&T Comcast"). The Ratepayer Advocate is an agency with a statutory mandate to protect the interests of utility and cable consumers in New Jersey and is a strong proponent of increased competition in the utility and cable markets as a means of providing ratepayers more choice, better quality, and lower rates for services. The Ratepayer Advocate is concerned that the merger of AT&T Broadband and Comcast will serve to stifle potential competition in the cable and broadband marketplace in New Jersey ultimately resulting in higher prices coupled with lower service quality, an outcome that would not be in the public interest.

As several parties correctly state in their initial comments, AT&T and Comcast must prove that the instant transaction is in the public interest before approval can be granted by the Federal Communications Commission ("FCC").¹ The FCC's public interest analysis includes an

¹ Petition to Deny of Consumer Federation of America et al, *In re Applications for Consent to the Transfer of Control of Licenses by Comcast Corporation and AT&T Corp., Transferors to AT&T Comcast Corporation, Transferee*, Docket No. MB 02-70 at 27-29 (Apr. 29, 2002) ("CFA Comments"); Comments of Bell South Corp., *In re Applications for Consent to the Transfer of Control of Licenses by Comcast Corporation and AT&T Corp., Transferors to AT&T Comcast Corporation, Transferee*, Docket No. MB 02-70 at 5 (Apr. 29, 2002) ("Bell South Comments"); Comments of Qwest Communications Intl Inc., *In re Applications for Consent to the Transfer of Control of Licenses by Comcast Corporation and AT&T Corp., Transferors to AT&T Comcast Corporation, Transferee*, Docket No. MB 02-70 at 22 (Apr. 29, 2002) ("Qwest Comments"); Comments of SBC Communications Inc., *In re Applications for Consent to the Transfer of Control of Licenses by Comcast*

evaluation of the benefits, or harms, resulting from the merger's likely effects on competition. To find that a merger is in the public interest, therefore, the FCC must "be convinced that it will enhance competition."² However, the dominant role of AT&T Comcast as sellers of programming and high-speed Internet services to the public and buyers of inputs from content producers calls into question whether it can pass the FCC's public interest scrutiny given its obvious threat to competitors and consumers alike.³ Moreover, the FCC's own analysis has illustrated that the larger the cable operators become and the more regional control they gain, the higher are monthly prices for consumers.⁴ So instead of passing on savings realized from the merger to consumers in the form of lower prices, cable companies often divert these savings elsewhere.⁵ At the present time, cable prices are already high due to monopoly control of the cable market, and once this merger occurs it will raise the level of concentration in the industry to unparalleled levels and further reinforce the monopoly power, thereby producing even higher cable prices.⁶

Equally questionable is AT&T Comcast's assertion that the proposed merger will better enable them to provide widespread local and exchange access telephone service using their cable facilities – a definite public benefit.⁷ Parties claim, however, that AT&T Comcast fails to provide tangible evidence that they will actually deploy cable telephony once the merger is approved, and without such proof all that is left is empty promises.⁸ They also claim that AT&T made identical promises in the past regarding its mergers with TCI and MediaOne, and subsequently failed to deliver on its cable telephony promises.⁹ The FCC approved both the TCI and MediaOne mergers in reliance on AT&T's promise to launch cable telephony.¹⁰ The

Corporation and AT&T Corp., Transferors to AT&T Comcast Corporation, Transferee, Docket No. MB 02-70 at 26-27 (Apr. 29, 2002) ("SBC Comments").

² Bell South Comments at 6 (citing *I/M/O Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Doc. No. 00-30, 16 FCC Rcd 6555 (2001)).

³ CFA comments at 15; Bell South Comments at 5; Qwest Comments at 22; SBC Comments at 26-27. Parties have also argued that once merged, AT&T/Comcast will account for approximately 30 percent of cable subscribership in the U.S. and will be the largest residential broadband internet service provider, enabling them to exert this tremendous market power to the detriment of ratepayers and programmers.

⁴ CFA Comments at 14 (citing Report on Cable Industry Prices, *I/M/O Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, February 14, 2002, p. 29.). The FCC's analysis also shows that satellite does not exert significant competitive effect on cable industry price, quantity or quality. *Id.* at 16-19.

⁵ CFA Comments at 14.

⁶ *Id.* at 15.

⁷ See Qwest Comments at 23 (citing Comcast Application).

⁸ Qwest Comments at 23; Bell South Comments at 10-11; SBC Comments at 26-30.

⁹ Qwest Comments at 24-26; SBC Comments at 26-28.

¹⁰ Qwest Comments at 24.

Ratepayer Advocate, therefore, urges the FCC to forego approval of the merger absent verifiable evidence of cable telephony and broadband deployment plans. Without this crucial evidence, AT&T Comcast cannot satisfy their burden of proving that the merger will in fact advance the public interest.¹¹

In New Jersey, the escalating price of cable services is a huge concern for regulators and legislators alike. Since de-regulation of the Cable Programming Service (“CPS”) tier of cable rates on March 31, 1999, New Jersey consumers have been subject to an increase of 51.5% in these rates, greatly surpassing the Consumer Price Index (“CPI”) over this period of 9.43%.¹² This drastic increase in cable rates caused an outcry from the New Jersey legislature regarding monopoly power within the cable television industry and its deleterious effects in New Jersey. In recognition of the dismal state of cable competition in New Jersey to date, members of the New Jersey Legislature proposed three separate bills aimed at fostering competition among cable companies in hopes that market forces will drive down cable rates.¹³ In addition, on March 11, 2002, the Legislature introduced a Joint Resolution that would create the “Study Commission on Encouraging Cable Television Competition” to evaluate and make recommendations on encouraging cable television competition in New Jersey.¹⁴ The Ratepayer Advocate applauds the New Jersey Legislature’s attempts to bring choice to New Jersey consumers, and strongly believes that the merger of AT&T and Comcast will halt the development of any real head-to-head competition in the New Jersey cable market, and will ultimately lead to even higher prices and diminished service quality.¹⁵

The Ratepayer Advocate agrees with the position of the Communications Workers of America (“CWA”) that service quality is an integral part of the FCC’s public interest analysis because the merger will likely effect the quality of cable services provided by AT&T Comcast to New Jersey consumers.¹⁶ One of the proposals by the New Jersey Legislature requires cable

¹¹ Qwest Comments at 23; Bell South Comments at 10-11; SBC Comments at 26-30.

¹² Press Release from State Senator Richard J. Codey dated April 29, 2002 at 1 (“Senator Codey Press Release”).

¹³ Senate No. 668, 210th Leg., 2002 Sess. (NJ. 2002)(concerning the provision of CATV service and telecommunications service); Senate No. 1304, 210th Leg., 2002 Sess. (NJ. 2002) (concerning cable television competition); Senate No. 234, 210th Leg., 2002 Sess. (NJ. 2002) (removing authorization for automatic renewal provisions in cable television franchises).

¹⁴ SJR No. 28, 210th Leg., 2002 Sess. (NJ. 2002). The Joint Resolution has been referred to the Senate Commerce Committee.

¹⁵ According to the FCC, “in communities where head-to-head competition is present, the incumbent cable operator has generally responded to competitive entry in a variety of ways, such as lowering prices, providing additional channels at the same monthly rate, improving customer service, [or] adding new services . . .” See Petition of RCN Telecom Services Inc., *In re Applications for Consent to the Transfer of Control of Licenses by Comcast Corporation and AT&T Corp., Transferors to AT&T Comcast Corporation, Transferee*, Docket No. MB 02-70 at 3 (Apr. 29, 2002)(“RCN Comments”) (citing *Annual Assessment of the Status of Competition in markets for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389, rel. Jan. 14, 2002, at ¶ 197.); see also CFA Comments at 19-20.

¹⁶ Comments of Communications Workers of America, *In re Applications for Consent to the Transfer of Control of Licenses by Comcast Corporation and AT&T Corp., Transferors to AT&T Comcast Corporation, Transferee*, Docket No. MB 02-70 at 21 (Apr. 29, 2002) (“CWA Comments”).

operators in New Jersey to report service complaints received by them to the New Jersey Board of Public Utilities (“BPU”).¹⁷ This would enable the BPU to gauge whether cable operators in New Jersey should be subject to increased service quality standards if numerous complaints allege poor cable service.¹⁸ The fact that AT&T Comcast admits they will consolidate customer care and provisioning, maintenance, and repair centers once the merger is complete, signals the potential for a serious decline in service quality. Decreased efficiency at the call centers due to employee unfamiliarity with the local cable territory, as well as the increased difficulty of local franchise authorities to monitor and enforce cable companies’ compliance with customer service performance standards can reasonably be foreseen.¹⁹ In the interest of consumers, the FCC should require the merged entity to adhere to service quality standards subject to financial penalty for non-compliance.²⁰ Such conditions protect consumers against potential AT&T Comcast cross-subsidization of competitive broadband services achieved by cutting back quality of service provided to customers of its less competitive cable service.²¹

The Ratepayer Advocate also supports the assertions of several parties who claim that the FCC must condition its approval of the merger on AT&T Comcast’s agreement to distribute its programming to competitors on a nondiscriminatory basis.²² This is an extremely important condition given that the proposed merger would create new incentives for Comcast to withhold networks it currently owns from competitors and other multichannel video programming distributors (“MPVD”) in its former and newly acquired properties. Therefore, the ban on exclusive contracts between vertically integrated cable networks and incumbent cable companies contained in Section 628 (c)(2)(D) of the Cable Competition and Consumer Protection Act of 1992²³ must be extended by the FCC²⁴ if incumbent cable companies are to be subject to meaningful competition.²⁵ Furthermore, in recognition of the stronghold AT&T Comcast would have over the residential broadband market stemming from their ability to deprive rival Internet Service Providers (“ISPs”) of meaningful access to subscribers, it is necessary to condition approval on AT&T Comcast providing all ISPs with nondiscriminatory access to its cable modem platform.²⁶ The Ratepayer Advocate recommends that the FCC impose merger

¹⁷ This proposal is not yet in bill form but may be added as an amendment to Senate Bill No. 668.

¹⁸ Senator Codey Press Release at 2. The BPU recently began an investigation into RCN’s service quality performance resulting from numerous customer complaints received by the Board regarding RCN’s cable service.

¹⁹ CWA Comments at 21-22.

²⁰ *Id.* at 22-23.

²¹ *Id.* at 23.

²² Bell South Comments at 28; SBC Comments at 32; RCN Comments at 35.

²³ 47 U.S.C. § 548.

²⁴ Currently, Section 628 (c)(2)(D)’s ban on exclusivity will “sunset” in October 2002 unless the FCC extends the ban. *Id.*

²⁵ Bell South Comments at 28.

²⁶ Qwest Comments at 29-30.

conditions that will prohibit the merged AT&T Comcast from stifling competition in all segments of the cable market and in the developing advanced services market, because to approve the merger without conditions would have adverse effects on consumers with no guarantee of counterbalancing benefits.

The importance of the FCC's public interest analysis in this matter is magnified given the potential of AT&T Comcast to engage in rampant abuses of market power once the merger is approved, and the possible perils to competition in the cable and broadband markets. It is therefore incumbent on the FCC to carefully consider the repercussions of this merger on consumers and competitors alike, and where necessary impose conditions that will enable competition to flourish in the cable and broadband markets.

Respectfully submitted,

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Acting Director and Ratepayer Advocate

By: /s/ Ava-Marie Madeam
Ava-Marie Madeam, Esq.
Assistant Deputy Ratepayer Advocate

I, Donna Carney, hereby certify that on the 17th day of May 2002, a copy of the foregoing “Reply Comments of the New Jersey Division of the Ratepayer Advocate” was sent via electronic mail to the following:

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/s/ Donna Carney
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